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Review of Reinventing Data Protection?

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Reinventing Data Protection?, S. Gutwirth, Y. Poullet, P. de Hert, C. de Terwangne, S. Nouwt, eds., Springer, 2009. 342 pp. + xxix. ISBN 978-1-4020-9497-2.

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Modern society is increasingly infiltrated by, and reliant on, information technologies. CCTVs monitor the streets, data mining programmes create profiles, a host of internet task recall functions record our surfing, and ambient intelligences are always on the 'lookout' for human presence. In short, humans, both physical and virtual, are being surveilled by technologies that are increasingly minute, sophisticated and embedded. Our actions, our transactions, our individual relationships, and our relationship with the community more generally are more and more shaped by these technologies, as well as by information and risk. And *Reinventing Data Protection?* is keenly aware of this reality, exploring a variety of issues implicated by the hardening of the social cast in which we find/bind ourselves.

The editors have compiled contributions to the "Reinventing Data Protection?" conference, held in Brussels in November 2007. They identify their objective as invigorating the debate on data protection and its primary concepts and objectives, arguing that ongoing commitment to such a debate is crucial given that our relationship with others, with society, and with artefacts, at least those that are becoming intelligent, is changing drastically due to the introduction of ever more powerful technologies (p. ix). They highlight the recent recognition in Europe of data protection as a fundamental (quasi-constitutional) right distinguishable from privacy, citing this as an extremely important milestone in the understanding and realisation of these rights, and they position the 2007 conference and this book as an important first phase in exploring the scope of these rights and the concepts and laws upon which they currently rely (p. xvi).

Something of a *tour de force*, the book consists of 19 chapters organised into four parts, and a concluding note. Part I (chapters 1-5) addresses concepts fundamental to this area, namely privacy, autonomy, consent, identity, and data, and how they are shifting. Part II (chapters 6-8) examines in detail some of the relevant actors, including citizens, data protection authorities, and trade associations. Part III (chapters 9-12) considers some of the eccentricities of regulation, including the key role played by technical standards, and the potential for a global model. Part IV (chapters 13-19) focuses on some special issues, ranging from standardisation needs, to secret actors, to the interplay between

related rights (freedom of information, privacy, data protection), to the impact of the internet for risk and norm creation. The chapters are rich with information and ideas, and they are consistently well researched. As there is far too much content to summarise and critique in a short review such as this, I will rather outline how the theoretical foundation of data protection is articulated (in Part I), for the concepts explored there spill through the remainder of the more specific or directed contributions.

In chapter one, de Hert and Gutwirth differentiate data protection from privacy, and elucidate the scope of data protection legislation as being the protection of individuals from unjustified collection, storage, use, and dissemination of personal information. They stipulate that it “formulates the conditions under which processing is legitimate,” and relies on principles such as ‘fairness’ and ‘specificity’, and on mechanisms such as ‘consent’ and ‘data subject access’ (p. 4). They then explore the history of its development in Europe, characterising its recent identification as a fundamental right as a transformative moment in the law. However, after reviewing a series of cases from Strasbourg and Luxembourg, they caution that the vindication of this right is by no means without doubt (ie: the judicial recognition of data protection as an independent right has not been promising).

In the second chapter, Rouvroy and Pouillet are concerned with the values that underlie privacy and data protection, seeing the latter concepts as instrumental tools for fostering autonomous behaviour and resilient democracies. They challenge a number of foundations for privacy that have been relied on, saying that value-anchoring is more appropriate because it will prove more enduring and durable in the face of unprecedented and unpredictable technological developments (p. 48-50). They resist a reductionist approach to the ‘self’ as being comprised merely of bits of data, and they are somewhat ambivalent toward the raising of data protection to quasi-constitutional status, arguing that it complicates normative assessments. They centre their privacy and data protection analysis in the German constitutional context, drawing on a landmark 1983 case of the German Federal Constitutional Court, a case which still resonates with its acknowledgement that privacy and data protection are merely tools through which more fundamental values – dignity and individual personality – are pursued, and therefore through which democracy is fostered.

In chapter three, Rodotà notes our contradictory views on data, and the tensions this creates for our governance efforts. Reviewing recent trends, he adopts a very pessimistic view:

Reality is becoming increasingly estranged from the fundamental rights framework, for three basic reasons. Firstly, after 9/11 many reference criteria changed and the guarantees were reduced

everywhere in the world Secondly, this trend ... was extended to sectors that are trying to benefit from the change in the general scenario - ... business. Thirdly, the new technological opportunities make continuously available new tools for classification, selection, social sorting and control (p. 78)

Reiterating that rights are continuously eroded, he cautions that the ongoing reinvention called for in *Reinventing Data Protection?* must not become regressive or forgetful of the past. New understandings must enliven the past and add scope and breadth to the notion of data protection, and new understandings must assiduously resist permitting society to slide into the quagmire of control, surveillance, and social selection.

In the fourth chapter, Brownsword reminds us that the European social and legal framework, including that relating to technology and data, is grounded on a philosophy of rights, and that this imposes (or should impose) certain limitations on data users, and additionally on what we can expect from data protections. He challenges the positions – as he understands them – of the Utilitarians and the Kantian duty advocates (pp. 84-87), and he argues that consent continues to be (and is unavoidably) extremely important, especially to issues such as information integrity and data provenance.

In chapter five, Dinant adopts a much more technically-oriented approach, highlighting capabilities and trends. He notes that while the technical knowledge of consumers' organisations, privacy advocates, and legislators remain stable, the technology itself is advancing rapidly, becoming more subtle and more intrusive (p. 113). As such, monitoring (by a host of actors) has become the norm and non-surveillance the exception. He goes on to argue that EU data protection regulation, with its particular definitions of 'personal data' and 'data controller', is out of touch with the technology, and therefore suffers from two major gaps in the protection of individual privacy; gaps associated with (1) non-linkable human data not being captured for governance, and (2) ubiquitous human data processing mechanisms failing to be brought within any known data controller authority (p. 117).

So ends the 'theoretical' foundation of the book. Burkert closes the book by suggesting that the basic values which underlie our legislative efforts and the practices which have emerged as a result of technical innovation have diverged, and we are feeling a certain level of 'alienation'. Correctly noting that contributors to *Reinventing Data Protection?* have offered responses ranging from technical remedies, to legislative reform, to fundamental conceptual or structural change, he highlights the importance of keeping in step with social change, which means being cognizant of globalisation, differentiation in private and public service sector practice, and physical integration of devices (p. 337).

He cautions against expecting too much from data protection legislation, and concludes that even the imagination shown in *Reinventing Data Protection?* should not inspire too much optimism that the legal or social situation will improve.

The editors and their contributors have given scholars and privacy and data protection practitioners much to think about, and in that respect have admirably performed their desired function of facilitating the realisation of a transformation in data protection thinking. While they seem overly optimistic that anyone outside a small cadre of experts in this field are able or willing to see data protection rights as something distinct from privacy, they seem appropriately pessimistic about the chances of this book or indeed other efforts actually rectifying the disconnect that has developed between claimed social values, legislative capabilities, and data use practices. In short, as they clearly note, there is much more work to do beyond this book. As a closing comment, I note that the language is mostly very accessible, and the papers are well researched, and I would certainly recommend this book to anyone who wishes to think more deeply about data protection and its place in society and the legal hierarchy.